Supreme Court, U.S.
FILED
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No. _____

In the Supreme Court of the United States

EVELYN WHITE,

Petitioner,

v.

CRIME PREVENTION SECURITY SPECIALISTS and ACCIDENT FUND INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

PETITION FOR WRIT OF CERTIORARI

CHARLES W. PALMER
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QUESTION PRESENTED

I.

DOES THE APPLICATION OF SECTIONS 354 AND 357 OF THE MICHIGAN WORKERS' DISABILITY COMPENSATION ACT, WHICH REDUCE WAGE LOSS BENEFITS TO INJURED WORKERS OVER AGE 65 BY GIVING THE EMPLOYER A 50 PERCENT CREDIT FOR THEIR OLD-AGE SOCIAL SECURITY BENEFITS, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION?

LIST OF PARTIES

Petitioner

Evelyn White is an individual with no corporate affiliation.

Respondent

Crime Prevention Security Specialists is the employer respondent. The Accident Fund Insurance Company is the workers' compensation insurance company respondent.

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OPINIONS BELOW

Michigan Workers' Compensation Agency Magistrate's Opinion/Order dated August 16, 2004. Michigan Workers' Compensation Appellate Commission Opinion and Order dated July 21, 2005. Michigan Court of Appeals Order Denying Leave to Appeal dated January 3, 2006. Michigan Supreme Court Order Denying Leave to Appeal dated May 31, 2006.

JURISDICTION

On May 31, 2006, the Michigan Supreme Court denied petitioner's Application for Leave to Appeal. This Court has jurisdiction pursuant to 28 U.S.C. § 1257. This Petition for Writ of Certiorari was filed within 90 days of that order pursuant to Rule 13.1.

CONSTITUTIONAL PROVISION INVOLVED

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, 14th Amendment, Section 1.

STATEMENT OF FACTS

This case raises important questions as to whether Sections 354(1)(a) and 357 of the Michigan Workers' Disability Compensation Act, Michigan Compiled Laws (M.C.L.) 418.354(1) and 418.357, violate the equal protection clause of the U. S. Constitution, 14th Amendment,

Section 1. Injured workers in Michigan over the age of 65 receive substantially less in wage loss benefits than their equally situated younger injured workers. Given the increasing number of older citizens who continue to work after age 65, and the importance of preserving full wage loss benefits to injured older workers, petitioner respectfully requests this Court address this important constitutional issue, since neither the workers' compensation magistrate nor the Workers' Compensation Appellate Commission had the power to decide these important constitutional questions and the Michigan Court of Appeals and Michigan Supreme Court declined to hear them. Petitioner raised the equal protection issue under the U. S. Constitution at trial and throughout the appeals. (See Magistrate's Opinion, page 2.)

Petitioner Evelyn White was born November 18, 1926. On August 16, 1997, at the age of 71, and six years after she had begun receiving her old-age social security benefits, she began working for a security guard company, respondent Crime Prevention Security. (Transcript of the workers' compensation trial proceedings of June 9, 2004, hereinafter referred to as "T", pp. 8-9.) Petitioner testified that the reason she was still working at her age because she had bills and needed the money to pay on her home. (T9)

At trial the parties stipulated that on February 23, 2003, while in the employ of respondent Crime Prevention, she slipped and fell at work, fracturing her right ankle. The parties further stipulated that petitioner has continued to be disabled as a result of that injury. Respondent was voluntarily paying petitioner wage loss benefits based upon an average weekly wage of $320.28. Her wage loss rate of $211.64 was reduced by 50 percent pursuant to Section 357(1) of the Workers' Disability Compensation Act, M.C.L. 418.357(1).

After the reduction of 50 percent, petitioner's weekly wage loss rate was $105.82. (T7)

Respondent also indicated at trial that although they had been coordinating petitioner's old age social security benefits pursuant to Section 357(1), they had plans to switch coordination to Section 354 of the Act, M.C.L. 418.354. (T4-6) Petitioner asserted that regardless of which section applied, petitioner challenged the application of either section under equal protection guarantees in the Michigan and U. S. Constitutions. (T7-8) After the hearing, petitioner's benefits were reduced to $84.39 pursuant to Section 354.

At the conclusion of the trial, the Magistrate entered an Opinion and Order, dated August 16, 2004, which upheld the respondent's coordination of petitioner's old-age social security benefits. The Magistrate held that she was bound by the Michigan Supreme Court's decision in *Cruz v. Chevrolet Grey Iron, Div. of General Motors Corp.*, 398 Mich. 117 (1976). The Magistrate also declined to hold that Section 354 violates the equal protection clause because she lacked the power to consider the constitution of the validity of any part of the act. (Magistrate's Opinion, p. 3)

Petitioner appealed, and the Workers' Compensation Appellate Commission issued an Opinion and Order dated July 21, 2005, affirming the magistrate's decision. However, the Workers' Compensation Appellate Commission suggested that the Michigan Supreme Court's decision in *Cruz v. Chevrolet Grey Iron*, 398 Mich. 117 (1976) may no longer be binding because of the change in circumstances in the social security act since 1983. (Workers' Compensation Appellate Commission Opinion, p. 1) The Workers' Compensation Appellate Commission Opinion concluded with a request that the appellate courts consider the important legal issues raised

by this case: "Both parties have presented interesting points on a question deserving consideration by an appellate body with the authority and jurisdiction to do so."

Despite this request, the Michigan Court of Appeals denied leave to appeal in an Order dated January 3, 2006, and the Michigan Supreme Court denied leave to appeal in an Order dated May 31, 2006.

REASONS FOR GRANTING THE WRIT

Older Americans are working beyond age 65 in greater and greater numbers. In 1982, the year before Congress enacted the amendments to the Social Security Act eliminating the financial penalty for old age benefit recipients, 2.9 million Americans over age 65 were employed. By the 2nd quarter of 2006, 5.3 million Americans over the age of 65 were employed. (U.S. Dept. of Labor, Bureau of Labor Statistics, Unadjusted Employment level, 65 years and over, http://data.bls.gov/PDQ/outside.jsp?survey=In)

Many older workers like petitioner continue to work because they need the additional income to survive. Given the increasing numbers of older Americans who continue to work past age 65, the penalty imposed by Michigan and other states upon injured older workers is a significant and growing problem.

Sections 354 and 357 of the Michigan Workers' Disability Compensation Act, M.C.L. 418.354 and 418.357, as applied to Petitioner, violate the equal protection clause of the U. S. Constitution. The 14th Amendment of the United States Constitution, Section 1 provides, in part: "Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

The fundamental principle of equal protection law is that all persons similarly situated should be treated alike. In *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) at 404 U.S. 75-76, Chief Justice Burger described the purpose of the U. S. Constitution's 14th Amendment Equal Protection Clause:

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways. (Citations omitted) The Equal Protection Clause of that amendment does, however, deny states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, to that all persons similarly circumstanced shall be treated alike.' (Emphasis added)

Despite statutory prohibitions against age discrimination in both state and federal civil rights law, classifications based on age have not yet been held to be a suspect classification inviting strict scrutiny of the legislative purpose. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307; 96 S.Ct. 2262, 49 L.Ed.2d 520 (1976).

The Michigan Workers' Disability Compensation Act (hereinafter "Act") was originally passed by the Michigan Legislature in 1912. One of the legislative purposes of the Act is to create a system of fairly compensating workers injured in the course of their employment. M.C.L. 418.301(4). In calculating the amount of wage loss benefits

due an injured worker, the statutory scheme represents a legislative intent to provide a wage loss benefit which "fairly represents" the employee's wage earning capacity at the time of the injury. M.C.L. 418.371; *Rowell v. Security Steel Processing Co.*, 445 Mich. 347, 356-357 (1994).

The Michigan legislature first passed an age 65 reduction of wage loss benefits in 1965. Former M.C.L. 412(g), Public Act 44 of 1965. Section 357(1) of the Act, M.C.L. 418.357(1) now provides:

> (1) When an employee who is receiving weekly payments or is entitled to weekly payments reaches or has reached or passed the age of 65, the weekly payments for each year following his or her sixty-fifth birthday shall be reduced by 5% of the weekly payment paid or payable at age 65, but not to less than 50% of the weekly benefit paid or payable at age 65, so that on his or her seventy-fifth birthday the weekly payments shall have been reduced by 50%; after which there shall not be a further reduction for the duration of the employee's life. Weekly payment shall not be reduced below the minimum weekly benefit as provided in this act. (Emphasis added)

Prior to 1968, this section only applied to workers who were injured before their 65th birthday. The statute had the effect of reducing wage loss benefits to workers who were already receiving benefits at the time of their 65th birthday. In *Brown v. Saginaw Metal Casting Plants*, 68 Mich. App. 85, 89 (1976), the Michigan Court of Appeals held that this section violated equal protection guarantees because the section unreasonably discriminated against workers solely on the basis of age. The *Brown* opinion noted that the section did not reduce wage loss benefits for workers injured after

age 65. *Ibid*, at 68 Mich. App. 89. After remand, the Michigan Supreme Court denied leave to appeal, 400 Mich. 852 (1977).

However, Michigan Public Act 227 of 1968 amended this section by adding the words "or has reached or passed" between the word "reaches" and "the age 65" made the section applicable to workers injured while working after age 65. Former M.C.L. 412.9(g). See *Welch v. Westran Corp.*, 45 Mich. App. 1, 4 (1973). A search by this writer of the legislative history of Act 227 of 1968 in both the Journal of the House and Journal of the Senate reveals absolutely no comment or debate on the 1968 amendment. See House Journal of 1968, page 3770, and Senate Journal of 1968, page 2246 for a summary of the Legislative actions in passing Act 227 of 1968. Given the Michigan Court of Appeals decision in *Brown*, it would be a reasonable assumption that the legislative change was an attempt to correct the problem identified in *Brown*.

Section 354(1)(a) of the Act, M.C.L. 418.354(1) provides that wage loss benefits may be reduced by 50 percent of the injured worker's old age social security benefits. Section 354(1)(a) provides:

> This section is applicable when either weekly or lump sum payments are made to an employee as a result of liability pursuant to section 351, 361, or 835 with respect to the same time period for which old-age insurance benefit payments under the social security act, 42 U.S.C. 301 to 1397f; payments under a self-insurance plan, a wage continuation plan, or disability insurance policy provided by the employer; or pension or retirement payments pursuant to a plan or program established or maintained by the employer, are also

> received or being received by the employee. Except as otherwise provided in this section, the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under section 361(2) and (3) shall be reduced by these amounts:
> (a) Fifty percent of the amount of the old-age insurance benefits received or being received under the social security act. (Emphasis added)

Section 354(1)(a) was part of a package of 1981 amendments to the Michigan Workers' Disability Compensation Act which became effective March 31, 1982. Michigan Public Act 203 of 1981. In *Franks v. White Pine Copper Div.*, 422 Mich. 636, 656-58 (1985), the Michigan Supreme Court discussed the legislative history of this section. At 422 Mich. pages 655 to 656, the majority opinion cites a legislative analysis of Section 354 in the Senate Analysis, which asserted that by coordinating workers' compensation benefits with social security and other benefits, Senate Bill 595 would provide a major savings to employers in the cost workers' compensation while maintaining adequate benefit level for disabled workers. The majority opinion also cites a special report to the governor in 1984 by Theodore St. Antoine, which discussed the principle behind coordination of benefits as avoiding duplicative payments. *Ibid* at 422 Mich. 657-8.

If the legislative purpose of these two sections is to avoid duplicate payments to injured older workers, Sections 354 and 357 are irrational and do not meet that objective as applied to workers over 65 who receive old-age Social Security benefits. Reducing wage loss benefits of workers over age 65 does not meet the purpose of avoiding duplicate benefits. Older workers who are already receiving their old-age social security benefits are not duplicating those benefits when they

are injured at work and need to obtain replacement income. The effect of these statutes is to penalize older workers by reducing their wage loss benefits compared to injured workers not receiving their old-age social security benefits.

Petitioner's loss of her ability to earn $320.28 per week is not fairly compensated by coordinating her old age social security benefits under Section 357 to a resulting wage loss rate of $105.82. This result violates the principles of fair compensation for wage losses indicated in Sections 301(4) and 371. It is even more arbitrary and unreasonable to reduce petitioner's wage loss benefit to $84.39/week from $211.64 based upon application of Section 354.

The irrationality of applying these sections to older injured workers was not obvious to the Michigan Legislature in enacting them because until 1983, earnings for persons who received old age benefits received a dollar for dollar reduction in their old age social security benefits, creating a significant financial disincentive for older workers to continue working. However, in 1983 the Social Security Act was amended so that older workers could continue working and receive no reduction in their old age benefits. See 42 U.S.C. 403(b)(1), and Public Law 98-21 of 1983.

As applied to petitioner, Section 357(1) and Section 354(1)(a) of the Act violate the constitutional guarantee of equal protection. These reductions do not meet the legislative purpose of avoiding duplicative benefits and therefore irrationally discriminate against older injured workers. Instead of receiving $211.64 a week in wage loss benefits, petitioner received only $105.82 and then $84.39 a week.

Workers employed after age 65 who are injured and are receiving old age social security are treated differently than

injured workers less than age 65. Therefore, the equal protection question becomes: Is that discrimination substantially related to a legitimate state purpose? Petitioner's circumstances demonstrate the fallacy that somehow the statute's proper object is related to the declining wage earning capacity of older workers. This is not a case where an injured worker receiving benefits then begins receiving old age social security. In this case petitioner was hired at age 71 and injured at age 76. She was working because she needed the money in order to support herself and her husband. Reducing her benefit pursuant to Section 357 to less than one-half of her weekly benefit rate meets no legitimate purpose of the legislation.

With regard to Section 354, the application of that section to petitioner also does not meet the legislative purpose of avoiding duplication of benefits. Petitioner was already receiving her old age social security benefits when she was injured. Rather than avoiding duplication of benefits, the statute has the effect of drastically reducing her wage loss benefit so that it does not fairly compensate her for her loss of wage earning capacity. This also violates the intent of the Act to fairly compensate injured workers and is grossly unfair.

Four other states have held similar statutory provisions violate state equal protection principles. See *Industrial Claims Appeal Office of the State of Colorado v. Romero*, 912 P2d 62 (S.Ct. Colorado 1996); *Boan v. Richardson*, 198 W.Va. 545, 482 S.E.2d 162 (S.Ct. of Appeals of W.Virginia 1976); *Golden v. Westark Community College*, 333 Ark. 41, 969 S.W.2d 154 (S.Ct. of Arkansas, 1998); *Wal-Mart Stores v. Keel*, 817 S.2d 1 (S.Ct. of Louisiana 2002). In those cases, the reduction of workers' compensation benefits by old age social security benefits did not survive equal protection

analysis. They point out that wage loss benefits and old age social security benefits are not duplicative benefits. As stated in *Wal-Mart Stores, supra*, at 817 S.2d 17:

> Social Security old age benefits, on the other hand, are not intended to replace wages lost solely by an employee's inability to work. They are provided to persons over the statutory age regardless of injury. Unlike disability benefits or unemployment benefits, a person may receive Social Security old age benefits while still employed and earning additional income. Indeed, those age 70 and older, such as plaintiff, may earn unlimited amounts without any offset against their Social Security income.

Seven other states have held similar statutory provisions do not violate state equal protection guarantees. *John Tobin's Case*, 424 Mass. 250, 675 N.E.2d 781 (Massachusetts 1997); *Brown v. Goodyear Tire & Rubber Co.*, 3 Kan. App. 2d 648, 599 P.2d 1031 (COA Kansas, 1979); *McClanathan v. Smith*, 18 Mont. 56, 606 P.2d 507 (Montana S.Ct. 1980); *Sasso v. Ram Property Mgmt.*, 452 S.2d 932 (Florida S.Ct. 1984); *Vogel v. Wells Fargo Guard Services*, 937 S.W.2d 856 (Tennessee 1996); *Edwards v. Louisville Ladder*, 957 S.W.2d 290 (Kentucky COA 1997). The split between state supreme court decisions demonstrates the need for this Court to resolve this split in authority between the states.

Reduction of wage loss benefits under the Michigan workers' compensation system to workers already receiving their old-age social security benefits is not rationally related to the presumed goal of duplication of like-kind benefits. Petitioner was already receiving her old age benefits and was working to supplement these social security benefits. Therefore, reducing her wage loss benefits by her receipt of

her old age social security benefits is not rationally related to avoiding duplicative benefits. Rather, it penalizes workers over the age of 65 who are injured in the course of their employment. As applied to petitioner, Sections 357 and 354 of the Michigan Workers' Disability Compensation Act are irrational, overbroad and not substantially related to the assumed or stated purposes of the state law.

CONCLUSION

Since Congress eliminated the financial penalty against working old-age social security recipients, more older Americans are supplementing their income by working. Older injured workers over the age of 65 are entitled to the same wage loss protections as younger workers. The Michigan law in question irrationally penalizes older injured workers and violates the constitutional guarantee of equal protection under law.

Petitioner urges this Court to grant certiorari and consider this important issue.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

SUPREME COURT OF MICHIGAN

No. 130414

[Filed May 31, 2006]

EVELYN WHITE,
Plaintiff-Appellant,

v

CRIME PREVENTION SECURITY SPECIALISTS and ACCIDENT FUND INSURANCE COMPANY,
Defendants-Appellees.

JUDGES: CAVANAGH, J., would remand this case to the Court of Appeals for consideration as on leave granted. KELLY, J., would grant leave to appeal.

ORDER

On order of the Court, the application for leave to appeal the January 3, 2006 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

CAVANAGH, J., would remand this case to the Court of Appeals for consideration as on leave granted.

KELLY, J., would grant leave to appeal.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 31, 2006

/s/ Corbin R. Davis
Clerk

APPENDIX B

COURT OF APPEALS, STATE OF MICHIGAN

Docket No. 264622

[Filed January 3, 2006]

Evelyn White	)
	)
v.	)
	)
Crime Prevention Security Specialists	)
	)

JUDGES: Kurtis T. Wilder, Presiding Judge; Christopher M. Murray, Karen M. Fort Hood, Judges.

ORDER

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

Judge Hood would grant the application for leave to appeal.

/s/
Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 03 2006
Date

/s/ Sandra Schultz Mengel
Chief Clerk

APPENDIX C

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

Docket #04-0327

[Filed July 21, 2005]

EVELYN WHITE,
PLAINTIFF,

V

CRIME PREVENTION SECURITY SPECIALISTS AND ACCIDENT FUND INSURANCE COMPANY OF AMERICA,
DEFENDANTS.

APPEAL FROM MAGISTRATE JARVIS.

CHARLES W. PALMER FOR PLAINTIFF,
GERALD M. MARCINKOSKI FOR DEFENDANTS.

OPINION

RIES, COMMISSIONER

From an order by Magistrate Valencia L. Jarvis, entered August 23, 2004, subjecting the amount of plaintiff's worker's compensation benefits to a reduction because of MCL 418.357(1), the so-called 5% reduction on account of the receipt of retirement social security benefits, or MCL 418.354(1)(a), the coordination of benefits provision, plaintiff appeals contending that "section 354 and 357, as applied to plaintiff, violate the Equal Protection Clauses of the Michigan and U.S. Constitutions." Defendants disagree, and content that "case law has already resolved" the issue. We cannot agree with plaintiff and we do not agree with defendants.

We cannot agree with plaintiff because we have no authority to resolve constitutional questions. *Dation v Ford Motor Co,* 314 Mich 152 (1946). Our obligation is to presume the constitutionality of the Act and we do so here.

We do not agree with defendants that prior case law has resolved the issues plaintiff presents. *Cruz v Chevrolet Grey Iron,* 398 Mich 117 (1976), was decided almost 30 years ago and addressed the reductions imposed by MCL 418.357. We understand the primary concern in this case to relate to the coordination of benefits provision found in a section of the Worker's Compensation Act, Section 354, that did not even exist in 1976. Amendments to the Social Security Act in 1983 have eliminated an offset for wages earned by an employee after they attain a certain age. This kind of a change in circumstances could prevent even the employer in *Cruz* from claiming the decision is *res judicata. Socialist Workers Party v Secretary of State,* 412 Mich 571, 586 (1982). If Victoriano Cruz could challenge the plurality decisions in *Cruz,* we do not see why plaintiff should not be permitted to do so. As we read plaintiff's argument, it is (among other arguments) the different character of the social security benefits vis-à-vis the worker's compensation benefits that amounts to impermissible

disparate treatment, with the employee's age simply determining the kind of social security benefit received. As such, because *Cruz* addressed §357 and not §354 and because *Cruz* addresses the question in terms of age-based disparate treatment and because *Cruz* is a plurality and because of intervening changes in the applicable law, *Cruz* simply does not answer plaintiff's argument.[1]

We also disavow portions of *Wallace v Calhoun Stores,* 1993 ACO #32, and *Middleton Personnel Unlimited, Inc,* 1998 ACO #668. In *Wallace,* this Commission explained how section 354(1) is worded to allow an employer to coordinate social security benefits, even to an extent that the employer has not funded the benefit. In suggesting that this result "poses no equal protection problems," the opinion lapses into a constitutional judgment we have no authority to pronounce. *Dation, supra.*[2]

In Middleton, supra, we recognized our inability to consider constitutional questions but then went on to conclude "that the Magistrate was correct in citing *Cruz* and refusing to hold that the reduction in plaintiff's benefits" is unconstitutional. As set forth above, reliance upon *Cruz* may not be justified.

---

[1] We do not read *Rotondi v Chrysler Corp,* 200 Mich App 368, 376 (1993), or *Wozniak v General Motors Corp,* 198 Mich App 172, 175 (1993), as addressing any *constitutional* issue.

[2] In any event, the statement that "[coordination of social security retirement benefits] treats plaintiffs who suffer a disabling injury after retirement the same as plaintiffs who suffer a disabling injury prior to retirement" is not the point.

Both parties have presented interesting points on a question deserving consideration by an appellate body with the authority and jurisdiction to do so. Since we are not such an appellate body, and since the magistrate properly recognized this, we have no choice but to affirm her order and we do so.

Acting Chairperson Glaser and Commissioner Will concur.

/s/
Granner S. Ries Commissioner

/s/
Martha M. Glaser Acting Chairperson

/s/
Rodger G. Will Commissioner

STATE OF MICHIGAN
WORKERS' COMPENSATION APPELLATE COMMISSION

Docket #04-0327

[Filed July 21, 2005]

EVELYN WHITE,	)
PLAINTIFF,	)
	)
V	)
	)
CRIME PREVENTION SECURITY	)
SPECIALISTS AND ACCIDENT	)
FUND INSURANCE COMPANY OF	)
AMERICA,	)
DEFENDANTS.	)
	)

This cause came before the Appellate Commission on plaintiff's appeal from Magistrate Valencia L. Jarvis' decision, mailed August 23, 2004. The Commission has considered the record and counsel's briefs, and believes that the magistrates decision should be affirmed. Therefore,

IT IS ORDERED that the magistrate's decision is affirmed.

/s/
Granner S. Ries Commissioner

/s/
Martha M. Glaser Acting Chairperson

/s/

Rodger G. Will Commissioner

APPENDIX D

OPINION/ORDER
Michigan Department of Labor & Economic Growth
Workers' Compensation Agency Board of Magistrates
PO Box 30016, Lansing MI 48909

Claimant's Social Security Number [REDACTED]

Plaintiff's Name(s) Evelyn White

Defendant(s)/Carrier(s)
A. Crime Prevention Security Specialists/Accident Fund Insurance Company of America

Type of Claim (For statistical purposes only)
F. [X] Misc.

Award Entered
12. [X] Other

Injury Date(s) Established	**Average Weekly Wage**
February 23, 2003	$320.28

IT IS FURTHER ORDERED that: Plaintiff's weekly compensation benefit $211.64 is subject to reduction pursuant to MCL 418.357(1) or MCL 418.354(1)(a).

/s/
Valencia L. Jarvis, Magistrate (213G)

Signed on August 16, 2004 at Detroit Michigan

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC
GROWTH WORKERS' COMPENSATION AGENCY
BOARD OF MAGISTRATES

EVELYN WHITE,	)
SSN: [REDACTED],	)
Plaintiff,	)
	)
VS.	)
	)
CRIME PREVENTION SECURITY	)
SPECIALISTS and ACCIDENT FUND	)
INSURANCE COMPANY OF AMERICA,	)
Defendants.	)
	)

OPINION

APPEARANCES

Charles W. Palmer (P-29271) on behalf of plaintiff.
Larry P. Beidelman (P-10638) on behalf of defendant.

HEARING DATE

June 9, 2004 (Tape # 0018-04)
Closing: Receipt of briefs June 9, 2004; June 28, 2004; and July 1, 2004

STATEMENT OF CLAIM

Plaintiff slipped and fell at work, fracturing her right ankle. The employer's credit for 50% of her old age

social security benefits violates the Equal Protection clauses of the Michigan and U.S. Constitutions.

DOI: February 23, 2003

STIPULATIONS

The parties stipulated that on February 28, 2003, plaintiff slipped and fell at work fracturing her right ankle; that plaintiff was in the employ of defendant at the time of the slip-and-fall; and that defendant is voluntarily paying the plaintiff wage loss benefits based on an average weekly wage of $320.28. The parties also stipulated that before coordination, plaintiff's weekly loss rate would be $211.64; that under Section 357(1) defendant reduced plaintiff's weekly rate to $105.82; that plaintiff was already receiving Old-age Social Security benefits at the time of her hire and that defendant did not pay any FICA taxes on earnings plaintiff made prior to her 65th birthday.

WITNESSES

Plaintiff

Evelyn White

Defendant

None

EXHIBITS

Plaintiff

Plaintiff's Trial Brief

Plaintiff's Reply Trial Brief

Defendant

Defendant's Trial Brief

TESTIMONY

Plaintiff testified that she was born on November 18, 1926. She started working with defendant when she was 71 years of age. Plaintiff testified that she was working at that age to pay bills, including her mortgage.

Plaintiff testified that as of February 23, 2003, her gross Social Security benefit was $1,102.00. I accept the aforementioned stipulations and make my findings in accordance with them.

In plaintiff's original brief, she argues that application of MCL 418.357 violates the Equal Protection Clauses of the Michigan and U.S. Constitutions. In her reply to defendant's brief, she also argues that MCL 418.354 violates the Equal Protection Clause of the State and U.S. Constitution.

Plaintiff acknowledges that in *Cruz v Chevrolet Grey Iron,* 398 Mich 117; 247 NW2d 764 (1976), the Michigan Supreme Court held that Section 357 did not violate equal protection principles. Plaintiff notes, however, as applied to her, Section 357 is irrational, overbroad, and not substantially related to the assumed purpose of the statute. Most offensive to plaintiff is being subject to having her weekly compensation benefit reduced where she was already receiving Old-age Social Security benefits when she was hired by defendant and defendant did not contribute any FICA taxes to these earnings she made prior to age 65. According to plaintiff, it is time "to

re-examine the holding of *Cruz v Chevrolet Grey Iron, supra,* and restore the rights of older injured workers to their full wage loss benefits."

Defendant argues that plaintiff's equal protection arguments regarding the age reduction provision of Section 357 are controlled by *Cruz*. Further, defendant argues that plaintiff has requested that the Board render a constitutional opinion, which would be outside the Agency's jurisdiction.

As acknowledged by plaintiff, the constitutional validity of MCL 418.357 of the Worker's Disability Compensation Act was considered by the Michigan Supreme Court in *Cruz v Chevrolet Grey Iron Division of GM,* 398 Mich 117. Further, as noted by defendant, this very issue was argued in *Middleton v Personnel Unlimited Incorporated,* 1998 ACO #668. In considering the issue of the constitutional validity of MCL 418.357, the Workers' Compensation Appellate Commission stated:

> The constitutionality of Section 357(1) has been addressed by the Michigan Supreme Court in *Cruz v Chevrolet Grey Iron, Division of General Motors Corp,* 398 Mich 117 (1975). In that case, the Supreme Court upheld the section's constitutional validity against similar challenges under the Equal Protection Clause. We are an administrative body with powers derived from a statute. The statute does not grant us power to consider the constitutional validity of any part of the act. Such issues are solely for the law courts. *Dation v Ford Motor Co,* 314 Mich 152 (1946). The decision of the Court of Appeals and the Supreme Court are binding on us. Therefore, we hold that the magistrate was correct in citing *Cruz* and refusing to hold that the reduction in plaintiffs benefits

violates the Equal Protection Clause of the Michigan Constitution.

I am likewise bound by *Cruz* and decline holding that the reduction in plaintiff's benefits violates the Equal Protection Clause of the Michigan Constitution. It is outside of my jurisdiction to decide whether or not Section 357 is violative of the Equal Protection Clause of the U.S. Constitution.

I likewise decline to hold that MCL 418.354 violates the Equal Protection Clause of the Michigan Constitution. The statute does not grant me the power to consider the constitutional validity of any part of the Act, including Section 354. *Dation v Ford Motor Company,* 314 Mich 152 (1946). Plaintiff corredtly notes that the issue of the constitutionality of Section 354 on equal protection grounds has not been addressed by the Michigan Supreme Court. The Workers' Compensation Appellate Commission has spoken on this question in *Wallace v Calhoun* Stores, *Inc,* 1993 ACO #32, and found that Section 354 "poses no equal protection problems." As such, I decline to hold that Section 354 is violative of the Equal Protection Clause of the Michigan Constitution. It is not within my power to decide the constitutional validity of Section 354 under the Equal Protection Clause of the U.S. Constitution.

As such, plaintiff's weekly benefit of $211.64 may be reduced under Section 357 or 354 based on her receipt of a monthly benefit of $1,102 in Old-age Social Security.

SO ORDERED.

WORKERS' COMPENSATION BOARD OF MAGISTRATES

/s/
VALENCIA L. JARVIS, MAGISTRATE (213G)

Signed this 16th day of August, 2004, at Detroit, Michigan.

(2)

No. 06-281

FILED
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SUPREME COURT, U.S.

In the Supreme Court of the United States

EVELYN WHITE,

Petitioner,

v.

CRIME PREVENTION SECURITY SPECIALISTS and ACCIDENT FUND INSURANCE COMPANY OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Is there a rational basis for Michigan's statute that allows for coordination of weekly workers' compensation benefits with 50% of an injured worker's old age social security benefits?

PARTIES TO THE PROCEEDINGS

Petitioner

Evelyn White is an individual with no corporate affiliation.

Respondents

Crime Prevention Security Specialists is the employer-respondent. The Accident Fund Insurance Company of America is the workers' compensation insurance company-respondent.

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Michigan enacted a coordination of benefits provision in its workers' compensation statute to provide a savings to employers in the cost of workers' compensation insurance. The legislative purpose was to dispel the notion Michigan was an unattractive state within which to do business due to high business costs. That is a rational basis for Michigan's coordination of benefits provision. Therefore, the provision does not violate the equal protection clause. Furthermore, constitutionality of state classifications based on age cannot be determined on a person-by-person basis. 2

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BRIEF IN OPPOSITION

SUMMARY OF REASONS TO DENY THE PETITION

There is a rational basis for Michigan providing in its workers' compensation statute for coordination of weekly workers' compensation benefits with 50% of the injured worker's old age social security benefits. (The 50% amount reflects the employer's contribution to the social security system). The legislative rationale for this provision is to provide a major savings to employers in the cost of workers' compensation while maintaining adequate benefit levels for injured workers. Also, the constitutionality of Michigan's statute cannot be determined on a person-by-person basis.

STATEMENT OF THE CASE

In briefing, petitioner erroneously says, "The parties further stipulated that petitioner has continued to be disabled as a result of that [work] injury." (Petitioner's Petition for Writ of Certiorari, p 2; bracketed word added). Respondents never stipulated plaintiff was disabled (*e.g.*, Petitioner's Appendix, 13a). Second, the only Michigan statute directly at issue is MCL 418.354, known as the coordination of benefits provision of Michigan's Worker's Disability Compensation Act.[1] Previously, petitioner had experienced

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[1] MCL 418.354(1) provides in pertinent part: "This section is applicable when either weekly or lump sum payments are made to an employee as a result of liability pursuant to section 351, 361, or 835 with respect to the same time period for which old-age insurance benefit payments under the social security act, 42 U.S.C. 301 to 1397f; payments under a self-insurance plan, a wage continuation plan, or a disability insurance policy provided by the employer; or pension or retirement payments pursuant to a plan or

a reduction under a different offset provision of Michigan's Worker's Disability Compensation Act, MCL 418.357, but that reduction stopped prior to trial and is not at issue.

Therefore, to correctly focus the issue factually for the Court, the question is whether MCL 418.354 [the coordination of benefits provision in Michigan's workers' compensation statute] can allow for a reduction in petitioner's weekly rate of compensation by 50% of her old age social security benefits without running afoul of the equal protection clause of the federal Constitution. US Const, Am XIV, § 1.

REASONS FOR DENYING THE PETITION

Michigan enacted a coordination of benefits provision in its workers' compensation statute to provide a savings to employers in the cost of workers' compensation insurance. The legislative purpose was to dispel the notion Michigan was an unattractive state within which to do business due to high business costs. That is a rational basis for Michigan's coordination of benefits provision. Therefore, the provision does not violate the equal protection clause. Furthermore, constitutionality of state classifications based on age cannot be determined on a person-by-person basis.

The Court reviews claims of unconstitutional age discrimination under the equal protection clause pursuant to a rational basis test, *i.e.*, whether the "varying treatment of

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program established or maintained by the employer, are also received or being received by the employee. Except as otherwise provided in this section, the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under section 361(2) and (3) shall be reduced by these amounts: ...."

different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational." *Kimel v. Florida Board of Regents*, 528 U.S. 62, 84; 120 S. Ct. 631 (2000). A statute that relates to an age classification "is presumptively rational, the individual challenging its constitutionality bears the burden of proving that 'the facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" *Kimel*, 528 U.S. at 84. Petitioner here claims the legislative purpose of Michigan's coordination of benefits statute – MCL 418.354 [§ 354], the only state statute at issue – is "irrational" because it "penalize[s] older workers by reducing their wage loss benefits compared to injured workers not receiving their old-age social security benefits." (Petitioner's Petition for Writ of Certiorari, p 8 and p 9, respectively; emphasis removed).

Michigan's coordination of benefits statute is not "irrational". The Legislature had two purposes in enacting it. The first purpose was Michigan's desire to dispel the notion that it was an unattractive state within which to do business due to high workers' compensation costs. The Michigan Supreme Court explained in *Franks v. White Pine Copper Division*, 422 Mich. 636, 655; 375 N.W.2d 715 (1985):

> Legislative analysis of § 354 by the Senate Analysis Section reiterated these concerns:
>
> Coordination of benefits has been a major concern of employers for years. Public Act 357 coordinated workers' compensation with unemployment compensation (effective January 1, 1982) [MCL 418.358; MSA 17.237(358)] but failed to address coordination with Social Security and other insurance

> and pension plans. By coordinating workers' compensation benefits with Social Security and other benefits, Senate Bill 595 would provide a major savings to employers in the cost of workers' compensation while maintaining adequate benefit levels for disabled workers.

Michigan's Legislature had a second reason for § 354 as well. The legislation is aimed at "'reduc[ing] the overlap between the various public and private wage replacement programs while ensuring adequate wage-loss benefits to injured employees.'" *Franks*, 422 Mich. at 656 (footnote omitted). A statute allowing for coordination of different income maintenance benefits in order to make the state attractive by lowering its cost of doing business, while maintaining adequate income maintenance levels to injured employees, is a legitimate aim of Michigan's Legislature.

The Michigan Supreme Court rebuffed a state constitutional challenge to this coordination of benefits provision using reasoning applicable here. The Michigan Supreme Court said:

> We may not premise our decision in these cases upon our own feelings about the wisdom of what the Legislature has done, nor any equitable concerns about the express proposes and potential effect of the enactment under consideration. [Citations omitted]. Nor is it properly part of our function to decide whether or not those things which the Legislature sought to change really constituted abuses. That the Legislature believed that it was abusive for an injured and disabled worker to receive workers' compensation benefits and benefits from certain other sources at the same time is clear. *Franks*, 422 Mich. at 658.

Other states have used similar rationales to enact statutes that reduce their workers' compensation costs. Those statutes have withstood constitutional challenges. *E.g.*, *Tobin's Case*, 424 Mass. 250; 675 N.E.2d 781 (1997) ["Because § 35E makes it more difficult for employees eligible for social security or pensions also to collect workers' compensation benefits, the burden on employers is alleviated. This also provides a rational basis for the statute." 424 Mass. at 253]; *Sasso v. Ram Property Management*, 452 So. 2d 932 (1984) ["(T)he district court found three legitimate state objectives", including "(t)o reduce the cost of workers' compensation premiums." 452 So. 2d at 934 including n 3]; see also, *Brown v. Goodyear Tire & Rubber Co*, 3 Kan. App.2d 648, 653; 599 P.2d 1031 (1979); *Edwards v. Louisville Ladder*, 957 S.W.2d 290, 296 (1997) [citing Michigan cases]; *McClanathan v. Smith*, 186 Mont. 56, 67-68; 606 P.2d 507 (1980); *Vogel v. Wells Fargo Guard Services*, 937 S.W.2d 856, 859 (1996). This Court in a related context has held that a statute limiting the receipt of two similar benefits is not constitutionally infirm under equal protection analysis. *Richardson v Belcher*, 404 U.S. 78; 92 S. Ct. 254 (1971).

Petitioner's alleged disparity of treatment results from "compar[ing]" employees who are injured after the age 65 to those injured at an age "less than age 65." (Petitioner's Petition for Writ of Certiorari, p 9 and p 10, respectively). But, the difference in treatment between these two classifications is not constitutionally invalid. Workers injured before age 65 will not be receiving old age social security benefits. Workers injured after that date may be receiving this other income maintenance benefit. Comparing workers' compensation recipients who are not also receiving old age social security benefits with those who are receiving both benefits is not a legitimate comparison. The former's

employer is not paying the injured worker two different types of benefits, while the latter is.

Petitioner also argues that because application of the statute may produce inequality to some persons, the statute must be constitutionally invalid. That is not so. *Kimel* described this Court's three preceding decisions where the Court held a state's reliance on broad generalizations, even though causing inequality in an individualized case, passes constitutional muster. *Kimel* explains:

> Our decisions in *Murgia*, *Bradley*, and *Gregory* illustrate these principles. In all three cases, we held that the States' reliance on broad generalizations with respect to age did not violate the Equal Protection Clause. In *Murgia*, we upheld against an equal protection challenge a Massachusetts statute requiring state police officers to retire at age 50. The State justified the provision on the ground that the age classification assured the State of the physical preparedness of its officers. 427 U.S., at 314-315, 96 S.Ct. 2562. Although we acknowledged that Officer Murgia himself was in excellent physical health and could still perform the duties of a state police officer, we found that the statute clearly met the requirements of the Equal Protection Clause. *Id.*, at 311, 314-317, 96 S.Ct. 2562. "That the State chooses not to determine fitness more precisely through individualized testing after age 50 [does not prove] that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation." *Id.*, at 316, 96 S.Ct. 2562. In *Bradley*, we considered an equal protection challenge to a federal statute requiring Foreign Service officers to retire at age 60. We explained: "If increasing age brings with it

> increasing susceptibility to physical difficulties, ... the fact that individual Foreign Service employees may be able to perform past age 60 does not invalidate [the statute] any more than did the similar truth undercut compulsory retirement at age 50 for uniformed state police in *Murgia*." 440 U.S., at 108, 99 S.Ct. 939. Finally, in *Gregory*, we upheld a provision of the Missouri Constitution that required judges to retire at age 70. Noting that the Missouri provision was based on a generalization about the effect of old age on the ability of individuals to serve as judges, we acknowledged that "[i]t is far from true that all judges suffer significant deterioration in performance at age 70," "[i]t is probably not true that most do," and "[i]t may not be true at all." 501 U.S., at 473, 111 S.Ct. 2395.
>
> Nevertheless, because Missouri's age classification was subject only to rational basis review, we held that the State's reliance on such imperfect generalizations was entirely proper under the Equal Protection Clause. *Ibid.* These decisions thus demonstrate that the constitutionality of state classifications on the basis of age cannot be determined on a person-by-person basis. Our Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it "is probably not true" that those reasons are valid in the majority of cases. *Kimel*, 528 U.S. at 84-86.

So too here, the constitutionality of Michigan's coordination of benefits provision "cannot be determined on a person-by-person basis," but rather on the basis of whether Michigan had a rational reason for enacting the statute.

Finally, Michigan had addressed another age-related provision in its workers' compensation statute and answered in a way similar to this Court's rulings described immediately above. In *Cruz v. Chevrolet Grey Iron Division of General Motors Corp*, 398 Mich. 117; 247 N.W.2d 764 (1976), Justice Coleman explained:

> We submit that these are matters for the Legislature or contracting parties as the case may be. It is certainly not for this Court to say at what age a general classification should be made or whether one should be made at all.
>
> If the classification falls unfairly upon some individuals, that fact alone does not permit a finding of unconstitutionality. It could well be a matter for legislative consideration, but not for the personal convictions of the seven of us.
>
> Importantly, the need for some orderly process, as opposed to a multitude of individual (and not necessarily fair) judgments of wage-earning capacities is apparent. If we had to project the wages to be anticipated in the future of each individual 65 and over before compensation benefits could be paid for injuries received, we would impose upon all concerned an incredible task and one quite different from projections for those under 25. The Legislature probably considered the difficulty in anticipating on an individual basis the mental, emotional and physical future of those 65 and over as well as projected retirement, productivity and other less apparent concerns having to do with wage-earning capacity. The method employed is grounded in reason. *Cruz*, 398 Mich. at 133-134.

Justice Levin in *Cruz* concurred saying:

> Worker's compensation is social legislation. The benefit program incorporates some concepts developed at common law and by statute to provide a damage remedy for injury or death. In some of its features the program diverges from principles applied in assessing damages in ordinary civil litigation. The departures and innovations aid some workers and their families and disadvantage others. "[T]he drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Massachusetts Board of Retirement v Murgia*, 427 U.S. 307, 314; 96 S.Ct. 2562, 2567; 49 L. Ed. 2d 520, 525 (1976). A classification affecting the amount of benefits is not unconstitutional simply because it is unfamiliar and may appear to be or is less generous than the common law or other statutes. *Cruz*, 398 Mich. at 143.

In sum, there is a rational basis for Michigan's coordination of benefits statute. For that reason, it does not violate the equal protection clause. The fact that an individualized situation is less generous factually speaking to one person than another does not make the statute unconstitutional.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 25th, 2006

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